The same extensive powers are now given to the courts by section 417 of the National Land Code in these terms: —

"417. (1) The Court or a Judge may by order direct the Registrar or any Collector to do all such things as may be necessary to give effect to any judgment or order given or made in any proceedings relating to land, and it shall be the duty of the Registrar or Collector to comply with the order forthwith."

When Haji Ahmad failed in his action, it was his remedy, by a claim to specific performance, that was barred. No pronouncement by the Court of Appeal in any way derogated from his substantive rights. His failure was merely on a procedural objection. On the other hand, the present respondent has established no right to the possession of the lands. Any action by her claiming possession must be barred — and barred in two ways. First, she can only succeed if she can establish a better right to possession, and that is clearly impossible against a purchaser for value. Secondly, notwithstanding that *adverse* possession for any length of time can never extinguish the title of the registered proprietor, whether under section 43 of the Land Code (now repealed) or under section 341 of the National Land Code, the law now in force is still inoperative so as to clothe the title of a bare trustee with the flesh and bones which go with the registration of title on the part of a beneficial owner. Section 341 reads: —

"Adverse possession of land for any length of time whatsoever shall not constitute a *bar* to the bringing of any action for the recovery thereof by the proprietor or any person or body *entitled to an interest therein*, and accordingly, the Limitation Ordinance, 1953, shall in no circumstances operate to extinguish any title to, or interest in, land."

This section, in effect, provides that no title can be acquired by prescription. Adverse possession means adverse to the registered proprietor. The registered proprietor must be one *entitled to an interest* in the land. A fully paid vendor who retains his title only on the register, as a bare trustee, has no interest whatsoever in the land. The possession of the purchaser is pursuant to the contract of sale and therefore not adverse, but rightful. The position of the parties to this appeal may be appropriately described as a stalemate. The appellants have possession of the lands and are entitled to all the rents and profits thereof. They cannot be dispossessed by the respondent. On the other hand the respondent can never be in any better position than she is in at present. She is worse off than the dog in the manger, which, at least, has possession *de facto*, though not *de jure*. In this state of affairs, where the appellants have the *jus*, should they not also have the *remedium*?

I think that, on the judgment of Hill J., which was in no way affected by that of the Court of Appeal, the appellants should be entitled to the declaration sought. Is this court powerless, merely by reason of the cause of action pleaded by Haji Ahmad, to give the appellants any relief? What they now pursue is a different cause of action from specific performance sought by their father, the Haji. They assert their title and interest, which is a right *in rem*, to the lands. The judgment of Hill J. is conclusive on this point. *Res judicata* only bars specifically their claim *in personam*. In my view, for which support may be found in the judgment of Thomson J. (as he then was) in *Bachan Singh's* case, the court has powers now under section 417(1) of the National Land Code as it then had under the Land Code to make such order as it thinks just and proper. As I have said earlier, the maxim to be applied is *ubi jus ibi remedium*. The declaration to which the appellants are entitled serves no purpose without the further consequential order. For my part, I think it is right that an order be made, as a necessary corollary to such declaration, that the proper registering authority do cause the necessary entries and memorials to be made in the issue and register documents of title for the appellants to be registered as proprietors of the lands concerned in respect of the undivided interests as claimed.

I would accordingly allow this appeal with costs, here and in the court below.

Appeal allowed.

Solicitors: *Jayadeva & Zahir; Eugene Khoo & Co.*

HALIJAH v. MORAD & ORS.

[F.C. (Azmi L.P., Gill and Ali F.JJ.) August 3, 1972]

[Alor Star — Federal Court Civil Appeal No. 76 of 1971]

Infants — Agreement — Contract for repayment of money lent — Void against infants.

Limitation — Claim for transfer of Land — Possession of land given as a creditor and not as a purchaser in order to collect profit — Kedah Enactment No. 60 (Limitation) and Limitation Ordinance, 1953.

This was an appeal against the decision of the High Court on a claim by the respondents/plaintiffs against the appellant/defendant for possession of a piece of land, and damages for trespass.

The appellant admitted occupation of the land but stated that she occupied it by virtue of a written agreement signed by them and their mother, now deceased, on April 12, 1948. The agreement concerned the loan of money on the security of the land in question. The appellant counterclaimed for an order that the land be transferred to her in pursuance of the aforesaid agreement.

The respondents denied ever executing the agreement, or in the alternative, if they had executed the agreement, they were infants at the time of the execution and that they had not ratified it. They alleged that the counterclaim was barred by limitation.

The respondents elected not to give evidence at the trial.

The learned trial judge found that on the date when the agreement was executed, the first and second respondents had reached the age of majority, but not the third and fourth respondents. He came to this view by applying the provisions of the Kedah Enactment No. 62 (Majority).

Held, dismissing the appeal: (1) the law to be applied in regard to a contract entered into by an infant at the material time, in Kedah, was the common law of England as qualified by the English Infants Relief Act, 1874. As the agreement in the present case was nothing more than a contract for repayment of money lent, it was absolutely void as regards the infant respondents. Therefore, the appellant's counterclaim against the third and fourth respondents must fail;

(2) the appellant was not given possession of the land as a purchaser but as a creditor in order to give her security for the loan and also to enable her to collect the profit from the land in place of interest for the loan. Since her claim for transfer of the land had been filed on October 5, 1965, the appellant was out of time both under the Kedah

Enactment No. 60 (Limitation) and under the Limitation Ordinance, 1953.

Cases referred to:-

(1) *John Edwards and Henry Issacs* v. *Robert Brudenell Carter, The Earl of Lisburne & Ors.* [1893] A.C. 360.

(2) *Williams* v. *Greatex* [1957] 1 W.L.R. 31.

FEDERAL COURT.

Oo Gin Sun for the appellant.

Goh Bean Sim for the respondents.

Azmi L.P.: The plaintiffs claimed against the defendant for possession of a piece of land comprised in S.P. No. 11921 in the mukim of Sungei Daun, Yen, Kedah and also damages for trespass. They also maintained in the statement of claim that the defendant occupied the land without their consent. The defendant admitted occupation of the land but stated that she occupied the land by virtue of a written agreement signed by them and their mother who is now dead, on 12th April 1948. She also counterclaimed for an order that the land be transferred to her in pursuance of the agreement aforesaid.

In answer to this counterclaim the plaintiffs denied that they ever executed the agreement or in the alternative if they had executed the agreement, they were infants at the time of the execution and that they had not ratified it. They also claimed that the counterclaim was barred by limitation.

In his evidence, the first plaintiff said he was born in 1928 as indicated in his identity card issued in 1948. He stated that he had his birth certificate then but has since lost it. He also said that he was forced by his mother to put his thumbprint on the agreement. He was then about 17 or 18 years of age. In cross-examination he admitted that he never applied for an extract from the birth register. According to him the second plaintiff was one year older than himself but the third plaintiff was two years younger and the fourth plaintiff 7 years younger.

The second plaintiff admitted putting his thumbprint on a certain document but could not say whether it was on the agreement produced in court. He was the eldest of the plaintiffs and according to him two years older than the first plaintiff. He also said that when he obtained his identity card his birth certificate was produced at the registration office but the birth certificate was kept in the custody of his mother. He also denied knowledge of the nature of the document on which he put his thumbprint. All he knew was what his mother told him, namely that she wanted to obtain $250 from the defendant to settle a debt.

The third plaintiff also said that he had his birth certificate when he got his identity card and according to the identity card he was born in 1931. There is no dispute that the fourth plaintiff was an infant at the time the document was executed.

The defendant elected not to give evidence at the trial.

The learned trial judge in his judgment dealt with the evidence on the question of ages of the plaintiffs. He came to the view that on the date of the agreement which was 12th April 1948, the first plaintiff was at least 19 years old. the second plaintiff between 20 and 21, the third plaintiff between 16 and 17 and the fourth plaintiff was about 10.

I do not see why the trial judge's finding of facts on this question should be disputed, particularly when the defendant had declined to come forward to give her evidence. She must have seen the children at the date of agreement and probably also knew the family well.

The learned judge referred to the Kedah Enactment No. 62 (Majority) and came to the view that under the provisions of this enactment the age of majority to be applied to the plaintiffs would be 18 years calculated according to Muslim law. Again in my view he was right and I would therefore accept his finding that at the time when the agreement was executed the first and second plaintiffs had reached the age of majority but not the third and fourth plaintiffs.

The next question was what law to apply on the question of a contract by an infant. I found that under section 11 of the Kedah Enactment No. 25 (Courts) the Court of Appeal was to apply in "matters of tort and contract the principles of law and equity in force for the time being in the colony of the Straits Settlements". That would mean that in this case the common law of England as qualified by the English Infants Relief Act 1874 should be applied.

I will now refer to the agreement which is in Malay. An English translation of the agreement is included in the record of appeal but there is no indication on it by whom it was done. In the circumstances, I would refer to the original direct. It was executed by the three plaintiffs and their mother, since dead as the first party and the defendant as the second party to it. The mother also purported to sign on behalf of the fourth defendant who was then a young boy and this was not disputed.

Paragraph (1) of the agreement states that the first party to the agreement had received $250 from the second party whereupon the first party agreed to hand over the possession of the land in dispute. Apparently the land was not fully developed *bendang* land, so there was provision for the second party to work on the land with a view to clearing and preparing it so that it could be fully fit for padi cultivation. Under the second paragraph the defendant agreed to hand over the possession of the land back to the first party on payment of $250 and any expenses incurred by her in the development of the land. The third paragraph provides that if the first party, after the lapse of three years from the date of the agreement. should fail to take back the land in the manner described in the second paragraph then the first party will execute a transfer of the land to the second party at a sale price to be calculated by the second party according to the provisions of the second paragraph. I take it that what was intended was that the sale price for the land would for the purpose of the transfer be equal to $250 plus the amount expended by the second party in the improvement of the land.

As to the ages of the plaintiffs at the time of the execution of the agreement, notwithstanding coun-

sel's argument that the first, second and third plaintiffs should have produced extracts of their birth certificates which would be available from the Registrar of Births and Deaths, I would accept the learned judge's finding of fact that the third and fourth plaintiffs were at the time of the execution of the agreement infants.

It was also argued before us that even if accepting the finding that these two were still infants at the time of the execution of the agreement their defence of infancy must fail because they had failed to repudiate the contract within a reasonable time after reaching majority. In support counsel cited the case of *John Edwards and Henry Isaacs* v. *Robert Brudenell Carter, the Earl of Lisburne & Others.*[1] We were referred to the judgment of Lord Watson at page 360 and Lord MacNaghten at page 367 but with respect to learned counsel this case was dealing with a marriage settlement made by an infant which at common law is a voidable and not a void agreement, as can be seen from the headnote of the report, which reads as follows:—

"By a marriage settlement the father of the intended husband (then a minor) covenanted with the trustees to pay them an annuity during the life of the intended wife or of any child or grandchild of the marriage, and the trustees were to pay the annuity to the husband during his life or until his bankruptcy, and after determination of his interest for the benefit of the wife and the issue of the marriage. The settlement contained an agreement by the husband to vest in the trustees upon certain trusts all property to which he should become entitled under the will of his father. The husband came of age about a month after he had executed the settlement. The father died nearly four years afterwards, leaving property by will to his son. More than a year after his father's death the husband repudiated the settlement:—

Held: affirming the decision of the Court of Appeal ([1892] 2 Ch. 278) that the settlement was as regards the husband voidable, not void; that if he chose to repudiate it he must do so within a reasonable time after he came of age; that he must be treated as knowing the contents of the deed whether he knew them or not; and that his repudiation not being made within a reasonable time, he was bound by the settlement."

The matter is clearly explained by the learned editor of *Ansons'* Principles of English Law of Contract, 22nd Edition at page 185 as follows:—

"Where an infant acquires an interest in permanent property to which obligations attach, or enters into a contract involving continuous rights and duties, benefits and liabilities, and takes some benefit under the contract, he will be bound, unless he expressly disclaims the contract during infancy or within a reasonable time of attaining his majority.

This rule has not been affected by the Infants Relief Act, 1874, or by subsequent legislation."

In my view the present case is covered by section 1 of the Infants Relief Act 1874 which provides that:

"All contracts entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied other than contracts for necessaries and of accounts stated with infants shall be absolutely void."

In my opinion the agreement in the instant case is nothing more than a contract for repayment of money lent, and is therefore absolutely void as regards the infant plaintiffs. For these reasons I would agree with the learned judge that the defendant's counterclaim against the third and fourth plaintiffs must fail.

The next question was whether the claim against the first and second plaintiffs was barred by limitation. The learned judge held the view that the Kedah Enactment 60 (Limitation) applies to this case and section 22 of that enactment provides that:

"No suit for specific performance of a contract shall be brought after the expiration of three years to be calculated from the time fixed for the purpose and where no such time is fixed from the time when performance is demanded and refused."

He held that the defendant's claim for the transfer of the land having been filed on 5th October 1965 she was out of time more than eight years and her claim for specific performance must therefore fail. Counsel for the appellant argued that the defendant in this case was a purchaser of the property and "she has been in possession and having the contractual right to be there she not only had an equity to be there but also the benefit of a contract to sell to her the land. That was not only an equity; it was an equitable interest in the land; she was in a sense the equitable owner of the land and so long as she was in possession of the land she did not lose her rights simply by not proceeding at once for specific performance." (See judgment of Lord Denning (as he then was) at page 36 in *Williams* v. *Greatex*[2]). With respect to counsel, the defendant in this case was not given possession of the land as a purchaser but as a creditor in order to give her security for the loan and also to enable her to collect the profit from the land in place of interest for the loan. In the circumstances the principle in my view stated above will not apply. She was therefore on 5th October 1965 out of time both under the Kedah Enactment No. 60 (Limitation) and under the Limitation Ordinance 1953.

I would therefore dismiss her appeal with costs. There will be the usual order that the deposit of $500 be paid out to the plaintiffs towards their taxed costs.

Gill and **Ali, F.JJ.** concurred.

Appeal dismissed.

Solicitors: *Oo Gin Sun & Co.; Goh Bean Sim & Co.*